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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 73

ROBERT NEWTON GARDNER, JR.,

v.

THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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Opinion Below

The Supreme Court of the State of California did not render an opinion in this matter.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §§1257 and 2101. The Supreme Court of the State of California denied a hearing on May 10, 1967, and the petition for a Writ of Certiorari was filed on June 3, 1967.

Constitutional and Statutory Provisions Involved

Fourteenth Amendment, Section 1, *Constitution of the United States*:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 6, Section 10, *Constitution of the State of California*:

> The Supreme Court, courts of appeal, superior courts and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition.
>
> Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.
>
> The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.

Section 1475, *California Penal Code*:

> The writ of habeas corpus may be granted in the manner provided by law. If the writ has been granted by any court or a judge thereof and after the hearing

thereof the prisoner has been remanded, he shall not be discharged from custody by the same or by any other court of like general jurisdiction, or by a judge of the same or any other court of like general jurisdiction, unless upon some ground not existing in fact at the issuing of the prior writ. Should the prisoner desire to urge some point of law not raised in the petition for or at the hearing upon the return of the prior writ, then, in case such prior writ had been returned or returnable before a superior court or a judge thereof, no writ can be issued upon a second or other application except by the appropriate court of appeal or some judge thereof, or by the Supreme Court or some judge thereof, and in such an event such writ must not be made returnable before any superior court or any judge thereof. In the event, however, that the prior writ was returned or made returnable before a court of appeal or any judge thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said Supreme Court or some judge thereof.

Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application and if any such prior application or applications have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise.

* * * * *

Section 1506, *California Penal Code*:

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the Judicial Council. If the people appeal, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall not be discharged from custody pending final decision upon the appeal or petition for hearing and he must, in any case in which a judgment of conviction has become final, be retaken into custody if he has been discharged; provided, however, that in bailable cases the defendant may be admitted to bail, in the discretion of the judge, pending decision of the appeal or petition for hearing. If the order grants relief other than a discharge from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

Question Presented

Whether the State of California may refuse to provide an indigent prisoner with a free transcript of a hearing of his habeas corpus proceeding for use in pursuing his remedies in the appellate courts of California and, if unsuccessful there, thereafter in the federal courts.

Statement of the Case

Petitioner is a California state prisoner serving an indeterminate sentence, with a maximum term of ten years, based upon a 1960 narcotics offense conviction.

On September 23, 1966 petitioner filed with the Superior Court for the County of San Luis Obispo a document which he styled a Petition for Writ of Mandate or Injunction.

Petitioner claimed that his rights to prepare, file and serve writs and other actions, and his right to have meaningful access to the Courts for determination of his claims, were being infringed by penal institution authorities.[1] Several weeks later petitioner also filed with the same court a petition for habeas corpus alleging essentially the same matters.

The superior court initially entered an order refusing to file the Petition for Writ of Mandate or Injunction, but on motion by petitioner that order was vacated and a fact finding hearing was set for the two actions, which were

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[1] Petitioner has consistently maintained that the authorities have delayed his mail, have denied him access to his own law books, legal papers, and writing tools, have transferred him frequently from facility to facility resulting in a loss of certain of the same materials, and have confiscated articles, advance sheets, and letters to and from various courts.

consolidated. It also ruled that both actions should be treated as requests for habeas corpus relief.[2] The Public Defender's office was appointed to represent petitioner and petitioner was allowed to testify at the hearing.

On February 15, 1967, subsequent to the hearing, a Memorandum of Decision was filed, reciting, *inter alia*, as follows:

> "The Court having reviewed the evidence and having read the authorities rules as follows:
>
> "That the Petitions be denied and the Writs dissolved. The Court specifically finds that:
>
> "1. There was no invasion of the constitutional rights of the petitioner;
>
> "2. That there occurred no impediment to his access to the courts;
>
> "3. That he had reasonable access to the courts and reasonable access to law books and other legal materials sufficient to meet the requirements of the law."

Thereafter, petitioner filed a motion for a free stenographic transcript of the evidentiary hearing, alleging his impoverished condition (which allegation has never been disputed) and his need for the transcript "as reference in the aid of the preparation for a Writ of *Certiorari* or *Habeas Corpus* which he is desirous of filing with the Clerk of the Supreme Court of the State of California."[3] A brief, prepared by petitioner without the assistance of counsel,

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[2] Habeas corpus is an appropriate remedy in California for denials of the fundamental rights of a person held in custody. See *In re Ferguson*, 55 Cal. 2d 663, 361 P. 2d 417 (1961).

[3] "Motion Under In Forma Pauperis Provision for Free Transcript of All Proceedings Had Herein," attached to "Notice of Motion" being printed by the Court as part of the Record in this case.

was also filed. The brief elaborated upon petitioner's need for a transcript and contained citations to authorities deemed applicable by petitioner. On March 1, 1967, without prior opportunity for oral argument, the motion was denied by the following order:

> "Petitioner seeks a copy of the transcript of proceedings had before Honorable Timothy I. O'Reilly. These are sought as 'evidence to be contained in the record for review in the Supreme Court of the State of California by avenue of Certiorari or Habeas Corpus.'
>
> "The petitioner may present all matters which were involved in his hearing before Judge O'Reilly by filing a new petition for Writ of Habeas Corpus before a Court having jurisdiction of his matter (including but not limited to the California Supreme Court). His request for relief by such a Court will not be affected by the action of Judge O'Reilly and aside from a statement in his petition that he has sought relief in this Court, with the date thereof, none of the proceedings here will be of concern to the Court before whom the new petition is presented. If that Court for some reason of its own wants a copy of the record, it can order one prepared.
>
> "There is no appeal from a denial of a petition for Writ of Habeas Corpus.
>
> "The petition is DENIED."

Petitioner sought review of the denial of a free transcript by filing a petition for a writ of certiorari in the California District Court of Appeal, Second Appellate District.[4] It was denied, as was a timely petition for a hearing

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[4] By amendment to the California Constitution, adopted in 1967, the name of the intermediate appellate courts in California was changed from "district court of appeal" to "court of appeal."

in the California Supreme Court. The latter denial was dated May 10, 1967. The petition for a writ of certiorari seeking review of that ruling was filed in this Court on June 3, 1967, and certiorari was granted May 6, 1968. The undersigned counsel was appointed to represent petitioner pursuant to an order entered May 20, 1968.*

Summary of Argument

Decisions of this court have established that the due process and equal protection clauses of the Fourteenth Amendment require that when the states provide an appellate procedure for direct or collateral attack upon criminal convictions or imprisonment, meaningful access to that procedure cannot be denied to indigents. Consequently, it has been held, if a transcript of a hearing is necessary to make the full utilization of such appellate procedure meaningful, the indigent defendant or prisoner must be provided with a transcript, or a reasonable alternative, free of charge.

California has adopted a constitutional and statutory procedure for habeas corpus. It is open at three basic levels of the state judicial system—the trial court, the intermediate appellate court, and the state supreme court. Although no appeal in the traditional sense may be taken from a denial of habeas corpus relief by a trial court under California law, original petitions for relief may be presented in the California appellate courts following such denial and federal habeas corpus relief is precluded in the interim period. A transcript of whatever hearing has been held at the trial court level is essential to the effective pres-

* Two other petitions for certiorari, seeking review of decisions denying petitioner relief on the merits of his underlying substantive claims, are presently pending. They were filed as Nos. 894 Misc. and 1001 Misc., October Term 1967.

entation of such original petitions in the appellate courts, particularly when as in this case the merits of the substantive claim turn upon complex issues of fact and involve serious policy considerations. Therefore, by denying petitioner, an indigent prisoner, a free transcript of his trial court evidentiary hearing, the California courts have severely disabled him from presenting his claims in the state appellate courts and have denied him due process and equal protection of law.

This case also concerns the problem of accommodating federal and state post-conviction remedies. The existence of such dual channels of relief, and the principles of exhaustion of state remedies which have developed limiting the jurisdiction of Federal District Courts inherently present serious problems of fairness to a state prisoner and to the proper administration of federal and state justice. When a state denies an indigent prisoner a transcript of a post-conviction hearing, it not only hinders him in his subsequent state court proceedings, but also reduces his ability to proceed ultimately in a Federal District Court and places an unnecessary burden on the administration of federal justice.

ARGUMENT

I.

Refusal to Provide an Indigent Prisoner With a Free Copy of the Transcript of His Habeas Corpus Hearing Constitutes a Denial of Due Process and Equal Protection of Law.

A. Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, an Indigent Criminal Defendant or Prisoner Cannot Be Barred From the Tools Necessary to the Meaningful Pursuit of State Remedies.

Under the applicable decisions of this Court, it is firmly established that a state may not, consistent with due process and equal protection of law, deny an indigent criminal defendant or prisoner access to the tools essential for the presentation of his defense and appeal and the pursuit of collateral remedies provided by law. Thus, the indigent may not be denied the assistance of a lawyer at his trial[6] or on direct appeal from conviction.[7] Nor may he be precluded from appealing a conviction or a denial of collateral relief solely because of his inability to pay a docket fee or similar charge.[8] And, he must be provided with a free transcript of trial proceedings in order to aid him in preparing his appeal from conviction.[9] As the Court stated

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[6] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[7] *Douglas* v. *California*, 372 U.S. 353 (1963).

[8] *Smith* v. *Bennett*, 365 U.S. 708 (1961); *Burns* v. *Ohio*, 360 U.S. 252 (1959).

[9] *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958); *Draper* v. *Washington*, 372 U.S. 487 (1963).

in *Griffin* v. *Illinois*, 351 U.S. 12, at 17-18 (1956), wherein the last-mentioned right was established:

> "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be an excuse to deprive a defendant of a fair trial.
>
> • • • • •
>
> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, *e.g.*, McKane v. Durston, 153 U.S. 684. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty."

The basic principle of *Griffin* is also applicable in the context of collateral proceedings such as habeas corpus if the use of a transcript of the proceedings by a petitioner is essential either because of a requirement of state law governing the perfecting of appeals[10] or because it is necessary to the effective preparation and presentation of an appeal:[11]

> "We specifically held in Smith that having established a post-conviction procedure, a State cannot condition its availability to an indigent upon any financial con-

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[10] *Lane* v. *Brown*, 372 U.S. 477 (1963).

[11] *Long* v. *District Court*, 385 U.S. 192 (1966).

sideration. And we held in Lane that the same rule applied to protect an indigent against a financial obstacle to the exercise of a state-vested right to appeal from an adverse decision in a post-conviction proceeding.

* * * * *

"The State suggests that there may be alternative ways of preparing for purposes of appeal, on account of the relevant proceeding at the trial level. Cf. Draper v. Washington, supra. In the present case, a transcript is available and could easily have been furnished. We need not consider a possible situation where a transcript cannot reasonably be made available and adequate alternatives are made available by the State." *Long* v. *District Court*, 385 U.S. at 194-95.

The present case appears to fall directly within the principles of *Griffin* and *Long* and the related precedents discussed above. The only possible contention that it does not would have to be based upon one peculiar facet of California habeas corpus procedure. Specifically, the only factor differentiating this case is that in California a habeas corpus petitioner is not entitled to appeal, in the traditional sense, from a denial of relief by a superior court. See *People* v. *Del Campo*, 174 Cal. App. 2d 217, 344 P.2d 339 (1959); *People* v. *Ryan*, 118 Cal. App. 2d 144, 257 P.2d 474 (1953). It is this narrow difference, and the statement in *Griffin* as to the availability there of a right of appeal, that can provide the only possible justification for the denial of this petitioner's motion for a free transcript. But an examination of the California habeas corpus procedure in the context of this case discloses that the basic considerations underlying the *Griffin* and *Long* decisions are present here.

B. The Use of a Transcript of a California Superior Court Habeas Corpus Hearing Is Essential to the Pursuit of Further Habeas Corpus Remedies Provided by Law.

Under the applicable California constitutional provisions and statutes specifying the jurisdictional requisites for the writ of habeas corpus, petitioner was initially entitled to proceed in a superior court, or in a court of appeal, or in the California Supreme Court.[12] Petitioner elected to commence in the superior court and filed there his several petitions. Had he instead chosen to proceed first in the court of appeal, he would clearly have been entitled to petition the California Supreme Court for a hearing following a denial[13] and would thus have been within the precedents of this Court requiring the provision of a free transcript.

In preparing his petitions to the superior court petitioner was not entitled to a court-appointed lawyer and he did not in fact have the assistance of counsel due to his impoverished condition. Not until the superior court judge determined that the application for relief on its face had sufficient merit to justify a hearing was petitioner given the assistance of counsel, and then for purposes of the evidentiary hearing only. When the superior court ultimately denied relief and discharged the writ, counsel was discharged and petitioner was left to his own devices in pursuing further avenues of relief.

At this point, petitioner's choice of state forums was narrowed to the state court of appeal or the state supreme

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[12] *California Constitution*, Article 6, §10; *California Penal Code* §1475.

[13] *California Penal Code* §1506.

court.[14] He was not yet entitled to proceed directly to a Federal District Court for habeas corpus relief since, even under the liberalized "exhaustion" principles established in *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Townsend* v. *Sain*, 372 U.S. 293 (1963), he still had avenues of state court relief open to him.

In drafting his original petitions for habeas corpus to the state appellate courts, petitioner, again unassisted by counsel,[15] was required by statute to state that he had applied for relief in superior court, that a hearing had been held, and that the superior court had rejected his contentions.[16] Again the petitioned court had discretion to grant or deny an evidentiary hearing after examining the facts alleged by petitioner and the issues presented. In exercising this discretion—in deciding whether to grant or deny a further hearing—the petitioned court would likely have used the transcript of the hearing in the lower court had it been available. Any prisoner with funds would obviously have made such a transcript available to the court.

Indeed, if the superior court had granted petitioner relief in the habeas corpus proceeding, the Attorney General would have been entitled to an appeal in the customary sense of that term, and petitioner would not have been discharged unless and until the appellate court affirmed the decision granting relief. *California Penal Code* §1506; *In re Chessman*, 44 Cal. 2d 1, 279 P.2d 24 (1955); *People*

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[14] Under §1475 of the *California Penal Code*, no further petitions for habeas corpus relief concerning the same subject matter and the same petitioner could be considered by any superior court in the state.

[15] As stated above, counsel was discharged upon the denial of relief by the superior court.

[16] *California Penal Code* §1475.

v. *Ryan*, 118 Cal. App. 2d 144, 257 P.2d 474 (1953). The Attorney General would have acquired a stenographic transcript to assist him in prosecuting such an appeal and the appellate court would have had authority to order the transcript included as part of the record.[17]

In the context of the above-described procedure, the importance to the applicant for habeas corpus relief of a transcript of any evidentiary hearing held while he pursues his state remedies is demonstrated with particular force by the nature of the substantive claims which this present petitioner has sought to establish. His allegations basically concern repeated harassment by California prison authorities resulting in a denial of his free access to the courts. Such claims are inherently complex. They involve the accommodation of reasonable confinement rules with the fundamental rights of those who are confined.

The complexity of the issues of law raised by such claims is mirrored by the complexity of the factual picture presented by this petitioner's allegations. Clearly his case for relief was not such that a court could summarily conclude that he had been denied all access to the courts and thus that relief should be immediately granted. Such a summary conclusion would have been difficult to square with the fact that petitioner was able to file numerous petitions and was granted an order to show cause by a superior court resulting in an evidentiary hearing at which he testified. Nor, however, were petitioner's claims such that, even if the alleged facts were true, no court could as a matter of law grant him relief. Indeed, the superior court in this case concluded at the outset that enough had been alleged to warrant the issuance of an order to show cause.

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[17] *California Appellate Rules*, Rule 60.

In short, then, petitioner's quest for habeas corpus relief in the state courts raised the kinds of factual and legal issues which could be decided only after a careful scrutiny of the facts and weighing of the relevant policies.

Obviously, in preparing petitions for relief in a case of this nature, it is essential for a prisoner to have the use of a transcript of the record of any hearing at which the facts were explored, particularly when he does not have the assistance of counsel at any stage, except the hearing itself. Absent such a transcript, the petitioner, as here, is left to his own lay memory of what was proved, disproved, admitted or denied. Consequently, his petitions may well omit pertinent facts established on the only occasion during which he had the assistance of a lawyer in airing his claims. Cf. *Draper* v. *Washington*, 372 U.S. 487, at 493 and 496-97 (1963).[12]

Moreover, even if a petitioner had total recall of what had transpired and were sufficiently trained in law to recognize and develop the strongest legal and factual arguments that could be made based upon the testimony given at the hearing, the inability because of poverty to acquire and cite a transcript in preparing petitions to higher courts would always severely limit any possibility that relief would be granted. Logic compels the conclusion that a reviewing court will give greater weight to a transcript or a petition documented by citations to or quotations from the same than it will to an unsupported allegation as to what transpired below. Cf. *Draper* v. *Washington*, *supra*. This conclusion again is uniquely demonstrated by the nature of this

[12] At the cited pages of *Draper*, the opinion of the Court elaborates upon the unlikelihood that an indigent who does not have access to a transcript can obtain adequate consideration of his claims by an appellate court.

petitioner's underlying claims,[19] for, while it is true that under California law the appellate courts have original habeas corpus jurisdiction and may order their own evidentiary hearings if they determine that a hearing is justified by the allegations, any court would react with considerable skepticism to a petition claiming a denial of access to the courts filed by a prisoner who is able to prepare and file such a petition and who previously was accorded a fact-finding hearing by a lower court. This skepticism can only be overcome by a well-documented petition containing citations to and quotations from the lower court record supporting the conclusion that the lower court wrongly decided the claim. A petition with no such citations or quotations is far less likely to obtain extensive consideration. Thus, when denied access to a transcript, the indigent prisoner is effectively precluded at the threshold of his pursuit of habeas corpus relief in the appellate courts.

C. Denial of a Transcript in This Context Constituted a Denial of Due Process and Equal Protection of Law.

By opening all levels of its courts to habeas corpus claims by state prisoners, California has brought into play the exhaustion principles which govern the jurisdiction of Federal District Courts to grant habeas corpus relief. Obviously, this results in consumption of a substantial amount of time prior to the point at which the state prisoner may proceed to test his case in Federal District Court without the threat of being rejected for not having exhausted a remedy provided by state law. In petitioner's case, the full pursuit of state remedies, along with the petitions for cer-

[19] It would undoubtedly be valid in any instance where a prisoner, unaided by counsel and without the benefit of a transcript to document his case, applies for habeas corpus relief in state appellate courts following a hearing and denial of such relief by a trial court.

tiorari to this Court from the judgments of the state courts, will have absorbed over two years by the time this case is heard in this Court, or more than one-fifth of the maximum term to which petitioner was sentenced. If such a procedure is to be tolerated under the Federal Constitution, it must at all levels provide a meaningful review of claimed infringement of important rights. By denying the indigent prisoner a transcript of the only hearing into his claims, however, California has so diminished the chances that relief will be granted an indigent at the second and third levels of its procedures following a hearing and denial at the first level, that it must be considered fundamentally unfair and thus a denial of due process of law.

A non-indigent prisoner would not suffer the same handicap as the subject petitioner in pursuing habeas corpus relief in the California appellate courts. A non-indigent prisoner could purchase and cite a transcript of any hearing in a superior court involving his case, and thus could more effectively prepare and prosecute his further petitions to the state court of appeal or supreme court. Consequently, in addition to violating the standards of due process, the California rule denying to indigents free transcripts of their habeas corpus proceedings results in an invidious discrimination based solely on the indigent's inability to pay and constitutes a denial of equal protection of law. *Draper* v. *Washington*, 372 U.S. 487 (1963); *Douglas* v. *California*, 372 U.S. 353 (1963); *Burns* v. *Ohio*, 360 U.S. 252 (1959); *Griffin* v. *Illinois*, 351 U.S. 12, at 17-18 (1956). As the Court stated in *Draper*, *supra*, at 496:

> "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting

his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions."

That duty of nondiscrimination was not discharged by the State of California in this case.

II.

Refusal to Provide an Indigent Prisoner With a Free Copy of the Transcript of His State Habeas Corpus Hearing Unduly Impairs the Effectiveness of the Federal Habeas Corpus Remedy.

Aside from the state appellate review aspects of this case and the denial of due process and equal protection of the laws in that regard, the questions here presented have what may be an even greater significance insofar as they involve the relationship between state and federal post-conviction procedures for state prisoners. Presumably, after this petitioner has exhausted his post-conviction remedies in all of the state courts to which access is provided (and assuming certiorari is applied for in this Court and denied in each instance involving the merits of petitioner's substantive claims), he may then proceed to seek habeas corpus relief in an appropriate United States District Court. The preparation of his petition and his ability to obtain effective relief in a federal forum will, however, depend upon his ability to satisfy certain criteria established in governing decisions of this Court and the provisions of 28 U.S.C. §2254, as constituted after the 1966 amendments thereto. As will be shown below, the availability of a free transcript of the state court habeas corpus hearing is not only crucial to petitioner's ability to satisfy such criteria, but it is also integral to an accommodation of the federal-state tensions

arising from the existence of dual channels for post-conviction relief. See Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 Yale L.J. 895 (1966).

In such landmark cases as *Brown* v. *Allen*, 344 U.S. 443 (1953), *Fay* v. *Noia*, 372 U.S. 391 (1963), and *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court has examined in depth the basic question of when an evidentiary hearing should or must be accorded to a state prisoner seeking federal habeas corpus relief. In each instance, central to the Court's reasoning was a concern as to the adequacy of whatever fact-finding proceeding had occurred at the state court level. Thus, it has been held that if the state prisoner could demonstrate that the state court did not reach and decide the issues of fact presented by the prisoner's evidence or that the state court's factual determination was not fairly supported by the state court record, then he would be entitled at the very least to a new hearing in the Federal District Court. See *Townsend* v. *Sain*, *supra*, at 313-14, 315.

But the indigent state prisoner who is not granted access to the transcript of his state court hearing will obviously face great difficulty in making such a showing in his petition to a federal court, and his ability effectively to pursue federal habeas corpus will thereby be lessened at the threshold. If such indigent prisoners are to be placed on any sort of an equal footing with prisoners who can afford to purchase a transcript, the Federal District Court must itself order up the record and scrutinize it carefully, unaided by the guidance of an appointed lawyer or even a fully-informed petitioner. This alternative would place a heavy and unnecessary additional burden on the federal courts in addition to denying the prisoner a fair chance fully to present his petition as an advocate with supporting references to the record. Cf. *Anders* v. *California*, 386 U.S. 738 (1967).

The manifest difficulty that an indigent state prisoner would have in presenting his federal petition under these circumstances is heightened when the present requirements of 28 U.S.C. §2254 are examined. Subparagraph (d) of that section establishes a presumption of correctness where a state court habeas corpus proceeding has resulted in a "written finding, written opinion, or other reliable and adequate written indicia," and casts the burden upon the applicant to establish fundamental error, lack of jurisdiction, or a denial of certain basic rights. Provision is made, in subparagraph (e) of the same section, for production of the record of the state court proceeding by order of the court if the applicant is an indigent and is unable to produce such record. But the record, even then, apparently, is produced only for the court's review and then only if the claim "challenges the sufficiency of the evidence adduced in such state court to support the state court's determination of a factual issue." [20]

The net result when Section 2254 and the California rule denying a transcript of superior court evidentiary hearings are combined is that the indigent California state prisoner who applies for federal habeas corpus has a heavy burden to overcome a presumption of the correctness of the state court decision and establish a prima facie case in the application itself, and yet at that stage he does not have a tran-

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[20] "(e) *If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein,* the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination." [Emphasis added.]

script and the District Court in which he is proceeding apparently does not have statutory authority to order a transcript prepared and delivered to him. Indeed, unless the challenge is directed to the sufficiency of the evidence to support a state court finding of fact, it would appear that neither the federal court nor the indigent can obtain the transcript unless the state itself comes forward willingly with the same.[21]

The inequities to the indigent and the tension thus created in federal-state relations can be alleviated by the simple measure of requiring as an element of due process or equal protection that the states furnish the transcripts to the affected indigent prisoner whenever an evidentiary hearing is held in a state post-conviction proceeding, whether or not the indigent has a right to appeal within the state appellate court system.[22] So long as it is required that a prisoner exhaust state post-conviction remedies before proceeding to Federal District Court for habeas corpus relief, the indigent prisoner who pursues this time-consuming procedure (including, as here, an evidentiary hearing) should be allowed to make full use of whatever tools are developed in the process that might expedite his search for relief. The state, as well as non-indigent prisoners in California, have access to the state trial court record in presenting their post-conviction petitions and responses at other levels of the judicial system. The same right should be accorded to indigent prisoners.

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[21] See note 20, *supra*.

[22] If, as the state has contended here, the prisoner has no right of appeal within the state appellate court system, the trial court's denial of relief would be a final judgment of the highest state court having jurisdiction of the matter, thus opening the way to a petition for certiorari directly to this Court. A transcript would be highly useful and perhaps essential to the drafting of the petition, and certainly to a fully-informed review by this Court.

Conclusion

For all of the reasons stated above, the decision below should be reversed and the case remanded with instructions to release the prisoner from custody unless he is provided, within a reasonable time, a free transcript of the habeas corpus hearing held in the Superior Court of the County of San Luis Obispo, State of California.

Respectfully submitted,

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